IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Brown v. Capital District Health Authority, 2006 NSSC 348

Date: 20061120
Docket: S.H. No. 248201
Registry: Halifax

Between:

Lindsay Meredith Brown

Plaintiff

v.

The Capital District Health Authority & Colleen Taylor

Defendants

Judge: The Honourable Justice Gregory M. Warner

Heard: October 10 & 11, 2006, in Halifax, Nova Scotia

Last Submissions: October 31, 2006

Counsel: Alan Parish, Q.C., counsel for the plaintiff/applicant

Cheryl Hodder, counsel for the defendant, Colleen Taylor

Karen Bennett-Clayton, watching brief for the defendant, Capital District Health Authority

Marjorie Hickey, Q.C., counsel for the College of Registered Nurses of Nova Scotia

By the Court:

A. **BACKGROUND**

[1] A patient has sued a nurse and hospital for improper care. She seeks disclosure of the nurse's discipline file, from the defendant nurse and the College of Nurses of Nova Scotia ("College"). The nurse and College (a non-party) oppose disclosure, pursuant to CPR 20.06, on the basis that (a) the file is not relevant to the action, (b) its disclosure is not necessary for the fair disposition of the case or to save costs, (c) its disclosure would be injurious to the public interest and (d), alternatively, the documents and information are privileged in accordance with the **Wigmore** test.

[2] The patient specifically pleads that, on June 11, 2003, while she was under the care of the nurse in the Surgical Recovery Care Unit of the hospital, she suffered extreme pain; she claims that the nurse failed to provide her with narcotics for pain, misappropriated and ingested the narcotics, administered saline intravenously without consent, falsified records regarding narcotics for the plaintiff, treated her while under the influence of narcotics, and, alternatively, administered morphine when she knew or ought to have known it would not be effective. She claims the

hospital is vicariously liable for the nurse's actions, and that it improperly supervised the nurse and ineffectively controlled its narcotic inventory. She claims to have suffered physical and psychological symptoms, including the development of fibromyalgia, which symptoms have affected, and will continue to affect, her earning capacity,

[3] On June 27, 2003, the hospital suspended the nurse for possible misappropriation of narcotics. On July 28, 2003, the manager of health services for the hospital complained to the College about the nurse. The College entered into an investigation; its discipline and/or complaints committee suspended the nurse's practising license, and in April, 2004, the College entered into a Settlement Proposal with the nurse.

[4] The College's investigation was conducted by Suzanne Kennedy. She reviewed the written complaint, interviewed the complainant and approximately eight to ten nursing staff, obtained relevant hospital records, and prepared and received signed statements from the interviewed witnesses. Her materials were collected into a single investigation report ("Report"). It included:

(a) the complaint;

(b) signed statements of the witnesses, and complainant;

(c) hospital records (patient records and narcotic inventory records) relating to the events described in the complaint and witness statements;

(d) a concordance prepared by her that cross-referenced the witness statements with the hospital records; and

(e) copies of the College's professional conduct process and policy statements regarding confidentiality.

[5] This Report was provided to the nurse, and to her union representative, for the purposes of responding to the complaint, and to the members of the College's complaints committee. The nurse responded to the complaint against her. The nurse's legal counsel in this action now has her copy of the Report.

B. **ISSUES**

[6] The issues are:

1. Whether all or any of the College's discipline file, including the Report, is relevant to this action (Civil Procedure Rule 20.06(1)).

2. If so, whether disclosure of the relevant documents is necessary for disposing fairly of the proceedings or for saving costs (CPR 20.06(3)).

3. Whether disclosure of the relevant documents would be injurious to the public interest (CPR 20.06(3)).

4. With respect to the documents that are only in the possession of the College (a non-party), whether their production might be compelled at trial (CPR 20.06(2)) and

5. Whether all or part of the College's discipline file is privileged and exempt from disclosure in accordance with the Wigmore analysis.

[7] This categorization of the issues is distilled from a series of decisions in the case of the Province of Nova Scotia against Royal and Sun Alliance and other insurers, which decisions are cited as: (2000) 190 N.S.R. (2d) 208 (Wright, J.); (2003) 218 N.S.R.(2d) 277 (Moir, J.); and 2005 NSCA 34 (an appeal from Justice Moir's decision).

C. **FIRST ISSUE - RELEVANCE**

C.1 **Relevance generally**

[8] The applicant submits that the contents of the discipline file, are, in their entirety, relevant, and should be ordered disclosed, except for the identity of patients referenced in the file. She submits that disclosure of the file will lead to evidence that is directly relevant to the issues pleaded, to determination of the nurse's credibility, and to relevant similar fact evidence. The respondents submit that, since

none of the contents of the discipline file refer to the plaintiff by name, or to any occurrence on June 11, 2003, nothing in the College's discipline file is relevant.

[9] For the general principle that the rules of pretrial disclosure should be interpreted liberally to effect full disclosure, the applicant cites:

(a) **Upham v. You** (1986) 73 N.S.R.(2d) 73 (NSCA), in particular paragraphs 26, 36 and 37, a decision decided under CPR 18, where the court wrote that, unlike other jurisdictions, fishing expeditions (within limits) are permitted in Nova Scotia, and that, at the discovery stage, relevance is based on the pleadings and not on ultimate admissibility at trial;

(b) **Westminer Canada v. Coughlan** (1989) 91 N.S.R.(2d) 214 (NSCA), a case decided under CPR 18 and 20; and

(c) **CMHC v. Foundation Company of Canada** (1982) 54 N.S.R.(2d) 43 (NSCA), a case decided under CPR 18.

[10] As to the meaning of relevance, the applicant cites the Law of Evidence in Canada**,** by Sopinka, Lederman and Bryant, 2nd Edition (1999, Butterworths) at section 2.35; **Campbell v. Jones** (1998) 168 N.S.R.(2d) 1 (NSSC); and **Di-Anna Aqua v. Ocean Spar Technologies**, 2002 NSSC 138, wherein Justice Scanlan noted

that, subject to a claim of privilege, our courts have repeatedly ruled that documents should be produced as along as they contain a “semblance of relevance”.

[11] The respondents rely on:

(a) **Gould Estate v. Edmonds Landscape & Construction Services** [1997] N.S.J. 545 (NSSC), at paragraphs 8 and 9, to the effect that relevance cannot be considered in a vacuum, involves an element of practicality and pragmatism, and, furthermore, citing **R. v. Mohan** (1994) Carswell Ont 66 (SCC), paragraph 22, requires the Court to perform a cost benefit analysis; and

(b) **Crosby v. Fisher** 2002 NSSC 76, wherein Justice Hood noted that the onus was on the applicant to establish relevance, and the contents of a Barrister’s Society discipline file “involving the internal workings of the discipline procedure” would not be relevant to a civil action not involving the Society.

[12] The burden of establishing relevance is on the applicant/plaintiff. See **Crosby** at paragraph 4 and **Upham** at paragraph 9.

[13] While application of the law of relevance to the pleadings in any case may require difficult analysis, the law itself is clear.

[14] Matthews, J.A., stated at paragraph 14 in **Eastern Canadian Coal Gas Venture Ltd v. Cape Breton Development Corp,** 1995 Carswell NS 436 (NSCA):

> . . . whatever the outcome at trial of the difference of opinion respecting relevancy, "at this stage a chambers judge must look to see if on the pleadings and the evidence, documents have a semblance of relevance".

At paragraph 18, Bateman, J.A., wrote in **Dowling v. Securicor Canada Ltd.**, 2003 NSCA 69:

> . . . Relevance, when determined, as here, at the very early stages of an action has a much broader meaning than that which is applied at trial.

These statements and decisions have been repeatedly cited by our Court of Appeal as the law in Nova Scotia. See, for example, **2502731 Nova Scotia Ltd v. Plazacorp Retail Properties** 2004 NSCA 123; **NS (AG) v. Royal and Sun Alliance,** 2005 NSCA 34; and **Dominey v. Cosmetology Association**, 2005 NSCA 100. In **Dominey** the Court added that there is no component of "cost benefit analysis" in the "semblance of relevancy" test.

C.2 **Similar Fact Evidence**

[15] The applicant submits that, not only do the College's investigation and discipline proceedings relate directly to the issues set out in the Statement of Claim, and raise matters that would be relevant to the nurse's credibility at trial, but her conduct on other occasions would establish as probable her conduct towards the plaintiff. The plaintiff relies on: **Dhawan v. College of Physicians and Surgeons of Nova Scotia** [1998] N.S.J. 170 (NSCA); **L.D.F. v. A Psychiatrist** [1984] B.C.J. 2929 (BCSC); and **Bergwitz v. Fast**, 1980 Carswell BC 13 (BCCA).

[16] The College argues that no part of its discipline file meets the two part test for determining the admissibility of **similar fact evidence**. With respect to the first part, it submits that such evidence is only admissible in exceptional circumstances; therefore, the relevance threshold requires the evidence to be clearly relevant. It acknowledges that two allegations in the Statement of Claim - the use of narcotics by the defendant while at work, and the use of saline in the butterfly IV, could satisfy the first part of the test. To satisfy the second part of the test, the probative value of the evidence must outweigh the prejudice to the defendant, and, the College argues, the College, other patients and their families, and the public. It submits that there

would be serious prejudice to the discipline process and resultant prejudice to the public (whose protection is the primary goal of the College), if disclosure was ordered. It relies on evidence of Ms. Kennedy that the College would not get the co-operation of the nurses complained about, nor the disclosure from many of their colleagues and co-workers, unless they were satisfied that their evidence would be held in confidence. To date, all discipline proceedings have been resolved by settlement as a result of non-disclosure.

[17] Traditionally a party was precluded from adducing evidence of another party's discreditable conduct other than conduct which forms the subject matter of the action. This exclusionary rule was not based on relevance, but on policy. The tendency to draw inferences, or to judge a person's action on the basis of character, was considered dangerous because human behaviour is dependent on circumstances and not on general propensity.

[18] In **R v. Handy** [2002] SCR 902, the Supreme Court of Canada set out a principled approach for determining admissibility of similar fact evidence. The current post-**Handy** state of the law is thoroughly described in the Second Edition Supplement (2004) to <u>The Law of Evidence in Canada</u>, supra, at pages 69 - 92, and

in The Law of Evidence, by David M. Paciocco and Lee Stuesser (2005, Irwin Law) at pages 50 - 93.

[19] Evidence of propensity or disposition is presumptively inadmissible because of its potential to prejudice a fair trial and is therefore only admissible in exceptional circumstances where the probative value outweighs the prejudicial effect. Where such evidence is focussed and specific to the circumstances similar to the subject matter of the action, so as to defy coincidence or other innocent explanation, its probative value may outweigh the prejudicial effect.

[20] The analysis involves three steps:

(a) assessment of the probative value of the proposed evidence;
(b) assessment of the potential prejudicial impact; and
(c) a balancing of the probative and prejudicial effects.

[21] Step I - The probative value depends on the strength of the evidence that the similar acts occurred, their "connectedness" to the issues in question, and the extent to which the similar acts tends to prove the acts in issue. At paragraph 82 in **Handy**, the court lists connecting factors as including:

(1) proximity in time;

(2) extent of similarity in details;

(3) number of occurrences;

(4) circumstances surrounding or relating to the similar acts;

(5) distinctive features unifying the incidents;

(6) intervening events; and

(7) other factors which tend to support or rebut the underlying unity.

The issues to which the factors are applied, to determine materiality, may differ from case to case. It may be that the discreditable conduct is directly related to the acts in issue, or to establishing an intent, or to assessing credibility.

[22] Step II - Assessing the prejudicial effect involves two considerations:

(1) Assessing the risk of inferring liability based on the fact that the defendant is a bad person (that is, moral prejudice); and

(2) Assessing the risk of confusion arising in attempts to determine the extent of the connectedness (that is, reasoning prejudice).

[23] Part III involves balancing of the probative value with the prejudicial impact. The balancing recognizes the *prima facie* inadmissibility of similar fact evidence and the requirement of the applicant to show admissibility on a balance of probabilities. It appears that in the context of a civil action, concern about the prejudicial dangers of relying on bad character, are not as great as in criminal cases. So said the Nova

Scotia Court of Appeal at paragraph 66 in **Dhawn**, and Paciocco/Stuesser [See pages 91 - 93 for their analysis of **Statton v. Johnson**, 1999 CarswellBC545 (BCCA); **College of Physicians & Surgeons v. K,** 1987 CarswellOnt 1056 (OCA); and **Mood Music Publishing Co. Ltd v. DeWolfe Ltd**. [1976] 1 All ER 763 (C.A.)].

[24] The court also notes that not all indirect evidence about an event in issue comes within the scope of the similar fact evidence rule. The rule applies when discreditable conduct evidence is sought to be admitted.

C.3 **Analysis**

[25] The threshold test of relevance at this early stage of the proceedings differs from that applicable at trial. Relevance is case specific, and, at this stage, is determined by the issues disclosed in the pleadings.

[26] The applicant has requested the entire file of the College with respect to its discipline action against the defendant nurse. I agree with the analysis of Justice Hood in **Crosby v. Fisher** that the internal workings and proceedings of the College, and of their discipline process, have no relevance to this civil action. The College's

Complaints Committee made no findings, and, if it had, the findings would not be binding on this Court.

[27] The Statement of Claim alleges that on June 11, 2003, the defendant nurse was negligent and breached her fiduciary duty to the plaintiff in several particulars. The Settlement Proposal (more properly called Agreement as it was signed by the College and nurse) reveals that the complaint, which gave rise to the College's actions, was that, between March and June 2003, the nurse misappropriated narcotics, self administered narcotics while on duty, falsified records, left patients unattended in the recovery room, and made numerous charting errors. The Agreement shows that the nurse agreed to a statement of facts that included some but not all of the allegations investigated by the College. Ms. Kennedy, in the process of investigating the allegations, took statements from the complainant, and co-workers, and obtained and reviewed related patient charts and other hospital records. From her notes she prepared written witness statements and arranged to have them signed by the witnesses. Ms. Kennedy states that none of the statements or records specifically mention the plaintiff or the date of June 11, 2003, when the plaintiff was under the defendant nurse's care in the recovery room. On cross-examination, Ms. Kennedy acknowledged that some of the witnesses she interviewed were unable to give

particulars as to the time or the patients involved in the alleged misconduct by the defendant nurse.

[28] Based on the pleadings, the statements of the witnesses, the related hospital records, and the defendant nurse's response to them, clearly meet the "semblance of relevance" test. The statements collected by Ms. Kennedy are the kind of disclosure that may, upon further discovery in this action, lead to direct evidence about acts upon which the statement of claim is founded. It is reasonable to suppose that, when she conducted her investigation, Ms. Kennedy was unaware of the plaintiff's claim (which was only made two years after her investigation), and therefore would not have specifically directed her attention to the plaintiff's care by the defendant nurse. The absence of any such specific reference to the plaintiff, or her time under the defendant nurse's care, does not make the statements of the witnesses and complainant, and the records, irrelevant.

[29] More importantly, application of the similar fact evidence rule - recognizing that the test for admissibility at this early stage in the action differs from the test at trial, makes the disclosure of the witness statements and related hospital records relevant. The Agreement discloses that the discipline process related to the

misappropriation of narcotics and their misuse by the defendant nurse while on duty between March 2003 and June 27, 2003 (when the hospital suspended her). Ms. Kennedy's evidence and the Agreement suggest that the statements and records are proximate in time, similar in details, apparently multiple in number, and relate to the defendant nurse at the same hospital recovery unit (while carrying out work duties) performing similar acts to those that the plaintiff claims happened to her.

[30] The College argued that the prejudicial impact referred to in the second part of the **Handy** analysis requires a weighing of what it describes as the "third party public interest" prejudicial effect; that is, the impact of admitting similar fact evidence on the College's disciplinary process, and consequently upon its ability to protect the public interest. With respect, the prejudice referred to in **Handy** is not the prejudice to non-parties, but the potential for moral and reasoning prejudice against the defendant at trial. The effect on the College's discipline process, and on other non-parties, is not part of the similar fact evidence admissibility analysis.

[31] In summary, the evidence collected by Ms. Kennedy from the complainant and witnesses, and the related hospital records, for the period March to June, 2003, and any response by the defendant nurse, is clearly relevant to the issues in this

action. It has a semblance of relevance as direct evidence, similar fact evidence, and in assessing the defendant nurse's credibility.

D. **SECOND ISSUE - NECESSITY**

D.1 **Parties' positions**

[32] This issue involves analysis of trial fairness and the cost of litigation. Because I have determined that disclosure of documents related to the internal proceedings of the College's discipline process are not relevant, this analysis is limited to whether it is "necessary" to disclose the complaint, witness statements, and hospital records obtained by the College's investigator in or about August, 2003, and the defendant nurse's response to the College.

[33] The applicant's brief is silent on this issue.

[34] The defendant nurse's brief reviews the **implied undertaking rule**, under its discussion of the confidentiality issue, and submits that this rule "prevents Ms. Taylor (the defendant nurse) from using the investigation report for any collateral purpose". She relies on **Sezerman v. Youle** [1996] N.S.J. 172 (NSCA), **Colby**

Physioclinic Ltd v. Ruiz, 2005 NSSC 287, and **Lac d'Amiante du Quebec Ltee v. 2858-0702 Quebec Inc**, 2001 SCC 51.

[35] The College's brief supports the defendant nurse's submission, and states at page 4:

> The College also takes the position that not only it, but also Colleen Taylor should be restricted from disclosing such information and documentation. The College submits that the situation is analogous to the implied undertaking rule in the civil litigation process.

The College relies on **Sezerman,** and Policy #4 for its submission that, as described at paragraph 60 in **Lac d'Amiante**, courts should avoid situations where a party would be reluctant to disclose information out of fear that it would be used for other purposes. In oral argument the applicant submits that the respondent's cases support existence of the implied undertaking rule in civil actions, but not administrative investigations.

[36] The College also notes that the plaintiff has taken no steps to conduct discovery of the defendant or any hospital employees, and the witnesses interviewed by the College can be discovered by the plaintiff, and the documents obtained by the

College can be accessed through the normal document production methods under the **Civil Procedure Rules.** The College says the plaintiff is simply trying to short circuit the discovery process, and fast track access to information usually obtained by other means. They further argue that, based on **Sawchuk v. Lee-Sing** [1987] S.J. 67 (Q.B.), evidence of the proceeding of a discipline committee would be hearsay and not admissible (having been compiled under different rules than those applicable to civil actions).

[37] In its oral submission, the College maintained its opposition to disclosure of the Report, the witness statements, and the identity of the witnesses interviewed by Ms. Kennedy. It has confirmed that all the witnesses interviewed by the College were identified through discovery of the nurse manager, and it is unnecessary for the plaintiff to get their identity through this disclosure application. Through inadvertence, the identity of the nurse manager as the complainant was disclosed in Ms. Kennedy's second affidavit; it is of no practical consequence, since it would most likely have been learned during discovery anyway.

[38] In response, the applicant argued that the potential cost to examine all of the staff at the hospital who might have spoken with the College's investigator could be

expensive, and therefore costly, and could cause delay. The effect would be to violate the object of the **Civil Procedure Rules** and, in particular, **CPR 1.03** - the just, speedy and inexpensive determination of every proceeding.

D.2 **Analysis**

[39] As a practical matter, counsel for the plaintiff would likely have discovered the unit manager of the hospital at an early stage, and, through her, learned the identity of those nurses interviewed by Ms. Kennedy. The applicant has not established that identification of the witnesses interviewed by the College is "necessary", in the sense of delay or costs.

[40] Necessity is also described in **Civil Procedure Rule** 20.06(3) as relating to "disposing fairly of the proceeding".

[41] In two respects. failure to disclose the witness statements and related hospital records could affect trial fairness.

[42] First, the statements taken by Ms. Kennedy from persons who appear for the most part to have come forward voluntarily, were taken in or about August, 2003 -

within two months of the events relevant to the within action. Assuming discovery of all these witnesses were to occur in the next several months, those witnesses would be asked to recall events that happened between three and one-half and four years ago. If they have any recollection, it is likely, as a matter of common sense, to be far less reliable and complete than the recollection they had at the time they gave the statements that were reduced to writing, signed, and provided to Ms. Kennedy. It would be unfair to all parties, but, particularly to the plaintiff who alleges that she was in no condition during the six hours she was under the care of the defendant nurse to recall events, and who is relying on the recollection of others who were present and in fit mental condition, to preclude their written record of what they reported in the context of the discipline investigation. It is too early to determine whether the statements themselves may be admissible, other than for the purposes of cross-examination; the rules of evidence do provide for admission of statements made close to the time of the events under the "past recollection recorded" rule, and, in any event, they could form the basis of questions at trial.

[43] A second concern is the **implied undertaking rule**. The defendant nurse provided to her counsel a copy of the Report which contains the statements of the complainant, the witnesses, and the related hospital records.

[44] The cases cited by the respondents support application of the rule to civil actions, but not to administrative proceedings. Counsel were unable to direct the court to any case that held that the implied undertaking rule applied to information disclosed in proceedings other than civil actions. They did direct the court to Policy # 4 of the College which states that all information disclosed to complainants or respondents remains the property of the College and shall not be disclosed, or used in any other proceeding, unless (among other exceptions) otherwise required by law.

[45] While many of the policy reasons for the implied undertaking rule may be applicable to discipline proceedings, and may be considered under the **Wigmore** analysis (our fifth issue), the implied undertaking rule is usually discussed under the heading of “Litigation Privilege”.

[46] Both Sopinka’s text (Chapter 14) and the Paciocco/Stuesser text (Chapter 7) deal with the rule under the “Litigation Privilege” heading. My conclusion from reading those portions of these two texts is that, to date, the rule has not been extended to the circumstances covered in this case. For example, in the Second Edition Supplement to Sopinka’s text, the authors note that the privilege did not

apply to police activities at the investigation stage (s. 14.75.1), or to expert reports prepared in relation to a complaint against a physician to the College of Physicians (s. 14.79.1). In the Paciocco/Stuesser text, at page 277, the authors write that whether Crown disclosure to the defence in criminal proceedings is subject to the implied undertaking rule is an open issue. They cite Justice Rosenberg's analysis is **P.(D.) v. Wagg**, 2004 CarswellOnt 1983(OCA), where the issue is discussed at paragraphs 29 - 47 (in particular, see Justice Rosenberg's observations at paragraphs 34 and 47).

[47] The text, **Phipson On Evidence**, Fifteenth Edition (2000: Sweet & Maxwell, London), while referring for the most part to the English civil procedure rules, makes general statements applicable to this issue:

(a) At page 595:

> "The rationale is based partly on the protection of privacy, partly in order to ensure candour and the giving of proper disclosure." (per **Home Office v. Harman** [1983] A.C. 280);

(b) At page 596 - 597:

> The implied undertaking applies to documents disclosed in proceedings by compulsion. If a party puts forward evidence or documents voluntarily, even if the effect of failing to do so would be that he failed in litigation or the application in question, the implied undertaking does not apply. [my emphasis]

(c) At page 597, by a quote from **Derby v. Weldon (No. 2),** [1998] 1 All E.R. 1002:

> In relation to documents voluntarily disclosed the Court has not invaded the privacy of the party. The party has, for his own purposes in defending a case, decided himself to use the documents rather than maintain his privacy. It is the party who has destroyed the privacy of the document, not the plaintiff nor the court . . . it is true as [counsel] says that apart from litigation the defendants would not have disclosed the documents. They had the unhappy choice of deciding whether to defend the proceedings at that stage, maintaining that privacy or, to put in the documents. But it is an unavoidable consequence of all litigation that a party who chooses to put in evidence, necessarily risks such evidence becoming available to others. In my judgment the special protection given to documents disclosed under compulsion of discovery procedures does not apply to any wider class of documents.

[48] I have not been convinced that the implied undertaking rule would prevent the defendant nurse from using the contents of the Report in this action. Her counsel has a copy of the Report. Even if she does not use it directly to cross-examine a witness, it could form the basis of any examination and/or cross-examination of witnesses, including those whose statements are in the Report. It would be entirely unfair (and no policy reason exists for such unfairness) to give the defendant this advantage over the plaintiff at trial.

[49] For these two reasons, I find that the plaintiff has established, on a balance of probabilities, that the production of the complaint, witness statements and hospital's records, are necessary to fairly dispose of this action.

E. <u>**THIRD ISSUE - WHETHER INJURIOUS TO THE PUBLIC INTEREST**</u>

[50] This issue arises out of the specific wording of **Civil Procedure Rule** 20.06. Similar words, and therefore consideration of the public interest, does not arise in the context of CPR 18 - Examination for Discovery, where the test for disclosure is "any matter, not privileged, that is relevant"; CPR 19 - Interrogatories (Rule 19.03(2) excludes only privileged and irrelevant material); CPR 21 - Admissions (Rule 2.02(2)(b) excludes only privileged or irrelevant requests or requests "otherwise improper"); CPR 22 - Medical Examination (CPR 22.02(1) excludes only irrelevant matters); and CPR 24 - Inspections of Property, which permits inspection of any property where "necessary for obtaining any relevant information or evidence".

[51] The respondents state that the basis for their argument is that confidentiality is essential for the success of the College's discipline process, and thereby for the protection of the public interest. This argument is identical to the issue analysed

under the claim for privilege (the second Wigmore criterion). It will be dealt with later in this decision. It is not reasonable, or necessary, to analyse it separately.

F. FOURTH ISSUE - COMPELLABILITY OF NON-PARTY DOCUMENTS

[52] If I am wrong in finding that the documents and information with respect to the internal workings of the discipline process are not relevant to the case at bar, then the issue remains of whether the documents in the custody of a non-party "might be compelled at a trial or hearing".

[53] None of the parties briefed the Court on the meaning of the words "might be compelled at trial".

[54] Gordon Cudmore, in Civil Evidence Handbook (Looseleaf: Carswell) at Chapter 6.9, writes that the obligation to produce documents (like the obligation to give evidence) extends to everyone, except the Queen, or a person exempted by statute or privilege. The issue of the claim for privilege is the fifth issue in this decision. No evidence was before the court from which I can infer that the

documents are not otherwise compellable. In other words, if the documents are relevant and not privileged, they are compellable.

G. FIFTH ISSUE - WIGMORE PRIVILEGE

G.1 Applicant's Position

[55] The applicant submits that the respondents' claim for confidentiality, based on the code of ethics of the College (in particular, Policy #4 of the Professional Conduct Manual, and the "Professional Conduct Process" letter or overview), should not defeat its claim for production because Policy #4, on its face, lists four exceptions to non-disclosure, one of which is "as required by law".

[56] The applicant submits that courts decline to order disclosure from non-parties only "where it can not be obtained more expediently from another source (e.g. a party)" or when privileged, per the **Wigmore** analysis. It cites four cases.

[57] In **El-Bayoumi v. Wade** (1989), 103 N.B.R.(2d) 49 (Q.B.), the Court ordered production of the tape of the discipline proceedings before the Dental Society. In the application, the Society took a neutral position regarding disclosure.

[58] In **A. v. L.**, 1998 CarswellAlta 99 (Q.B.), the plaintiff sought, from the College of Chiropractors, the material related to a sexual assault by a chiropractor on her, and complaints of similar acts on other patients, but not the defendant's own testimony (which was privileged by statute). The College offered to provide the material to the defendant. The defendant opposed disclosure on the basis of privilege. The Court held, at paragraph 22, that the defendant's evidence before the Society should remain privileged but that this privilege should not expand to other types of evidence; however, the balancing of the conflicting public interests favoured disclosure of the remainder, since (a) the plaintiff had received releases from some of the other patients, (b) it was not established that some information had been provided to the Society with an expectation of confidentiality, and (c) the applicant requested that the court, before release, edit the material to protect third party confidential information.

[59] **Slavutych v. Baker,** [1976] 1 S.C.R. 254, a decision which imported into Canada the four-part **Wigmore** analysis of privilege claims, is cited as supporting disclosure.

[60] **Crosby v. Fisher**, 2002 CarswellNS 104 (NSSC), is cited as deciding that, while material relating to the internal workings of the bar society's discipline process was not relevant in that case, in other cases, relevant material, not available elsewhere, is not be protected from disclosure. The applicant submits that the circumstances in this case differ from those in **Crosby**, where, applying the fourth **Wigmore** criterion, Justice Hood determined that injury from disclosure would be greater than the benefit gained for correct disposal of that case. The difference was that she found the materials sought to be disclosed were not relevant to the civil litigation. Since the defendant nurse in that case publicly admitted misconduct (through release of the Settlement Proposal), the details of her misconduct, no longer carry a significant privacy interest.

[61] In oral argument, the applicant reviewed the four **Wigmore** criteria in the context of the facts in this case. Applying the first **Wigmore** test, Counsel submits that the interviews did not originate in confidence since Policy #4 contained four

exceptions including "as required by law", which exception logically includes disclosure of documents pursuant to CPR 20.06. The College's investigator had given copies of the policy containing this exception to all participants, and none had asked questions about it. Counsel says the fact that there is proposed legislation presently before the legislature, which would make all information and proceedings respecting discipline proceedings confidential (section 44 of Bill No. 34), is an admission such is not the present state of the law.

[62] As to the second **Wigmore** test, Counsel notes that the witnesses were under a duty to disclose wrongdoing by the defendant nurse. In this case, the Agreed Statement of Facts in the Settlement Proposal expressly states that following Ms. Taylor's suspension by the hospital on June 27, 2003, "a number of other staff nurses came forward to report their observations of Ms. Taylor". This suggests that it is not essential or necessary that the witness statements remain confidential for the full and satisfactory maintenance of the relationship between the parties. Counsel cites paragraph 35 in **Finley v. University Hospital Board** [1986] S.J. 688 (SQB) for a comparable view:

> . . . generally, I find the conclusions reached are to the effect that no special provisions respecting confidentiality are required or necessary to encourage

> complaints against alleged wrongdoers in the field of medicine or of health generally.

[63] As to the third **Wigmore** test, the applicant agrees that the relationship between complainants, witnesses, and respondents, in discipline proceedings of professional bodies, should be sedulously fostered, but submits that confidentiality is not necessary to promote this goal.

[64] As to the fourth **Wigmore** test, the Court of Appeal dealt directly with this issue in **Upham v. You**, - the balancing of the injury by disclosure with the benefits of the correct determination of the litigation, and clearly came down on the side of the public interest in requiring full disclosure so that justice be done. Counsel asks the Court to follow the decisions in **L.D.F. v. A Psychiatrist**, and **Bergwitz v. Fast**.

G.2 <u>Defendant Nurse's Position</u>

[65] The respondent nurse relies upon the following decisions:

(a) **Slavutych v. Baker**, the decision which held that a confidential document (Peer Assessment Sheet given by the plaintiff to the University) should not have been admitted in an arbitration proceeding respecting the

plaintiff, on the basis the plaintiff had given it to the University with an expectation of confidence (per the **Wigmore** privilege analysis).

(b) **Smith v. Royal Columbian Hospital**, 1981 CarswellBC 143 (BCSC), wherein the Court ruled against disclosure of reports arising from a credential committee's summary investigation into the suitability of a doctor to obtain or maintain his hospital privileges. The Court balanced the competing interests, and found that: the reports from colleagues originated in confidence and depended on frankness; the relationship ought to be sedulously fostered; and the minimal benefit that would accrue to the plaintiffs (who would in any event need to rely upon their own expert evidence) did not override the benefits of protecting the confidentiality which was essential to the relationship within the hospital.

(c) **McNeill v. Nicoll** [1993] B.C.J. 638 (Master), wherein the Court found that notes made by the Nurses' Association were not relevant, and alternatively, if relevant, applying the Wigmore analysis, their help to the plaintiff by disclosure was far outweighed by the prejudice to the relationship between the Association and its members.

[66] Counsel submits, with respect to the first and second Wigmore criteria, that the communications originated with an expectation of confidentiality since all of the witnesses were provided with the College's written policy saying that the information would be kept confidential. Confidentiality was essential to full maintenance of the relationship between the parties. The role of the College is to promote safe nursing practices and to prevent harm to the public. The duty is owed to the public and not to individuals. In this regard Counsel cites **Cooper v. Hobart** [2001] 3 S.C.R. 537, **Edwards v. Law Society of Upper Canada** [2001] 3 S.C.R. 562, and **Finney v. Barreau du Quebec** [2004] 2 S.C.R. 17. Without a guarantee of confidentiality, nurses are less likely to be co-operative or to be frank. As to the third Wigmore test, community opinion favoured confidentiality; public support for self-regulation depended on the College's effectiveness in protecting the public, which is, in turn, premised on confidentiality of its discipline proceedings. With respect to the fourth Wigmore test, Counsel argues that, at worst, the plaintiff would be inconvenienced by non-disclosure. The hospital records and witnesses are all available through the discovery process. All of the witnesses interviewed by the College's investigator were witnesses whose names were provided by the complainant/Nurse Manager of the hospital. The defendant would not have an advantage at trial from having a copy of the witnesses' statements, because the

implied undertaking rule foreclosed its use. Counsel submits that the College should not be used to "fast track" the plaintiff's case. Colleagues and complainants would hesitate to come forward if their communications, given in confidence, were disclosed. Historically there have been no requests for disclosure of the College's discipline proceedings; consequently, the College had received co-operation and frankness from all participants, which had facilitated the resolution or settlement of all complaints. Counsel distinguished the plaintiff's cases: **El-Bayoumi**, on the basis that the Dental Society took no position respecting disclosure; **A. v. L.**, on the basis that the Court did not order the College to disclose; only the defendant was required to disclose documents that were edited by the Court to remove irrelevant and personal information.

[67] In oral argument, Counsel emphasized that much of the information sought is not relevant as it does not relate directly to the plaintiff or June 11, 2003, and that, according to the testimony of the College's investigator, a few of the witnesses would not have given statements if not assured by the College's policy that the interviews were confidential.

G.3 **College's Position**

[68] The College argues that the defendant nurse owes two duties of confidentiality: the first is owed to the College; the second arises from the more general duty of all nurses (defendant and witnesses) to keep private patient and medical information. The first duty is based on the College's policy and the special relationship between nurses and the College described in **McNeill v. Nicoll**; the breach of that duty would harm the relationship that all nurses held with the College. This first duty is also premised on the implied undertaking rule for which the College cites **Sezerman**, **Colby Physioclinic Ltd v. Ruiz**, and **Lac d' Amiante**.

[69] The second duty is based on the Code of Ethics and Standard of Practice, which describes, as professional misconduct, the disclosure of confidential patient and medical information. The court notes that the Code of Ethics qualifies confidentiality; it may be overcome "as may be legally required or where the failure to disclose would cause significant harm", or "unless there is a substantial risk of serious harm to the person or to other persons, or a legal obligation to disclose."

[70] The College refers the court to **Calgary Regional Health Authority v. United Western Communications**, 1999 ABQB 516. This case was about an

employee's right, as a "whistle blower", to release names of doctors who performed abortions. The Court granted an injunction prohibiting publication. It describes the duty of confidentiality of hospital employees.

[71] In oral argument, the College argued that the defendant nurse was prohibited from using the College's information because of the implied undertaking rule. It argued that discoveries had not been held and that the information was easily available from other sources.

[72] While acknowledging that Policy #4 contained a qualification ("except as required by law"), an absolute guarantee of confidentiality was not a requirement to meet the first **Wigmore** test; the test simply requires an atmosphere or expectation of confidentiality.

[73] With respect to the second **Wigmore** test, the College highlighted the risk that nurses would not come forward, and respondent nurses would not enter settlement agreements, if communications was not protected. This would significantly prejudice the College's ability to serve and protect the public interest, and maintain the integrity of the nursing profession. It suggests that the historical effectiveness of

the College - never having to disclose confidential information in Court proceedings before, and in achieving settlements in one hundred percent of complaints - would be prejudiced.

[74] With respect to the third **Wigmore** test, the College submits that self-regulation is only as successful as its discipline process is effective. Confidentiality, which promotes frankness, is what allows discipline to be effective. Both the community at large and the nursing community expect this frankness, and therefore assiduously support the confidentiality of the process.

[75] With respect to the fourth **Wigmore** test, the College argues that the injury by disclosure is greater than the benefit to the correct resolution of the litigation. It cites **Smith v. Royal Columbian Hospital** and **McNeill v. Nicoll** as guidance to this Court respecting situations where the two public policies conflict, and where other avenues exist for obtaining the information and documents sought from the College. The College submits that the benefits to the applicant in this case - convenience, reduced costs and access to information closer in time to the critical events, does not nearly measure up to the injury to the College, to potential witnesses, and to the public. It suggests that, since the date of many of the cases cited to the Court, there

has been a new public awareness of privacy interests that contextualize the **Wigmore** analysis. The College argues that exclusion of the evidence will not affect a fair trial, or put the trial process at risk, as the information is available elsewhere. Disclosure of confidential information is not, it submits, a substitute for the discovery process. Given that self regulation and discipline is premised on confidentiality, the College should be the place of last resort, not the place of first resort, for the information sought by the plaintiff.

G.4 LAW

[76] The law in Canada is not complicated, but its application, particularly in balancing competing public policies or social values, is nebulous and difficult. A succinct synopsis of the law is set out in:

> (a) **The Law of Evidence in Canada**, by John Sopinka, Sidney Lederman and Alan Bryant, Second Edition (1999: Butterworths) Chapter 14.1 - 14.41 and the Second Edition Supplement (2004) Chapter 14.22.1 to 14.22.3; and
>
> (b) **The Law of Evidence**, by David Paciocco and Lee Stuesser, Fourth Edition (2005: Irwin Law) Chapter 7.1 and 7.5.

[77] In England (as in Canada before 1976) privilege was traditionally confined to classes of confidential communications. Once a Court ruled that public policy

required protection to a class of confidences, no further balancing remained to be performed. At Chapter 20 in **Phipson on Evidence**, supra, the authors describe the two traditional common law classes - legal advice (solicitor - client) privilege and litigation privilege. At Chapter 21, **Phipson** describes other privileges that have been codified in statutes, most notably, spousal privilege and the privilege against self-incrimination. In England, "confidentiality" is not a separate head of privilege, although is an important consideration when assessing public interest immunity claims (See **Alfred Compton Amusement Machine v. CCE (No. 2)** (1974) A.C. 405). The only basis for excluding relevant evidence, on a case by case basis, appears to be where the evidence is found to be unnecessary or inappropriate, as described in **British Steel Corp v. Granada Television** [1981] 1All ER 417**.**

[78] **Slavutych v. Baker** was decided on the equitable doctrine that a party (the University) should be prevented from using against another party (a professor) evidence it had received from the professor for another purpose, on the promise of confidentiality. Spence, J., went on to state, as *obiter,* that the four part **Wigmore** privilege analysis should apply when determining all relational privileges, and that applying that analysis in **Stavutych** would have led to protection of the confidential communication. The Supreme Court, in **R. v. Gruenke** [1991] 3 S.C.R. 263, went

farther. While setting a very high standard for creation of new class privileges, it was prepared to recognize privilege on a "case by case" application of the Wigmore criteria. In **M(A) v. Ryan** [1997] 1 S.C.R. 157, the Supreme Court went even farther in its analysis, and its application of the Wigmore criteria by granting partial privilege to specific communications and documents within a case.

[79] Unlike other exclusionary rules, privilege is not designed to facilitate truth-finding, but rather to withhold probative evidence for public policy or social value reasons. For that reason, courts have been very reluctant to recognize new categories of class privilege. Even where class privilege exists, for example solicitor/client privilege, the absolute privilege is now being eroded. Courts seem to be saying that the creation of new class privileges, based on public policy reasons, is a matter for legislators.

[80] It is in this background that the category of privileges, based on a case by case analysis, or even on a document by document analysis, has evolved.

[81] Paciocco and Stuesser note, at page 235 of their text, that a concern with the case by case approach is the uncertainty of when communications will be protected; it

leaves participants in "confidential relationships" unable to predict, and therefore, unable to represent when such communications will be protected.

[82] To this concern I add a second. Parties (like the College in this case) who seek to protect communications from disclosure are generally seeking legal recognition of a type or kind or classification of communications or documents. The rationale for their claim, and the balancing factors they seek to apply, are often generic in nature, rather than specific to an individual circumstance. For example, in this case, the College and nurse seek to protect communication and documents generated by discipline proceedings of the College against the nurse, without distinguishing this circumstance from any other discipline proceedings of the College. Said differently, the case by case analysis is in reality an attempt for recognition of a class privilege. All communications, other than those protected by a class privilege, are presumed to be *prima facie* admissible and not privileged. This court should not grant privilege on a case or document specific application, unless special circumstances exist specific to the case or document so as to avoid recognition, by the back door, of a generic or class privilege.

[83] The **Wigmore** privilege is established when, on the facts of a case, or in respect of specific documents or communications, four criteria have been met:

> 1. The communications must originate in a confidence that they will not be disclosed.
>
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[84] Even though Wigmore intended his four criteria as a means of identifying relationships that might qualify for class privilege, I am obliged, because of **Gruenke** and **M(A)v. Ryan**, to apply it in a case-specific and document-specific analysis. The authors of the Sopinka text, at Chapter 14.23 and Chapter 14.24, note that our Courts have not applied the Wigmore analysis “logically and liberally”; to do so would result in immunity from disclosure of information by most professionals including doctors, clergy, journalists and others whose relationships are premised on confidentiality.

[85] Instead the cases seem to demonstrate the following methodology in carrying out their analysis:

1. First, courts avoid applying the Wigmore criteria by finding that documents or communications are irrelevant, or otherwise inadmissible (for example, hearsay), or are easily available to the applicant by other means. See for example **Crosby v. Fisher** (irrelevant); **Campbell v. Jones** (irrelevant), **Sawchuk v. Lee-Sing** (hearsay/inadmissible) and **Smith v. Royal Columbian Hospital** (information available by other means).

2. When a Wigmore analysis is unavoidable, the first three criteria seem to have caused no analytical difficulty; however, the fourth criteria - balancing privacy and other relationship interests with the desire to maximize disclosure necessary for truth finding , has often resulted in compromises, such as partial, restricted or conditional disclosure. For example, in **A. v. L**, the Court ordered the defendant chiropractor to obtain his discipline file from the College and produce it for editing by the Court. Records of other complainants obtained in this manner would only be released by the Court if the plaintiff produced releases from those other complainants who would not normally anticipate release in unrelated civil actions of their personal information. In that case the College opposed direct release to the plaintiff, as opposed to release by the

defendant, subject to admissibility. In **McNeill v. Nicoll**, the Court ordered notes prepared by the defendant nurse to be disclosed (as not privileged), but held, on the evidence before it, that it had not been established by the applicant that material possessed by the Nurse's Association was any more than advice by the Association to the nurse, which would not be relevant in the civil action, and which would otherwise cause more prejudice to the Association's role in promoting safe nursing practices and preventing harm to the public, than its exclusion would cause in the civil action. In **LDF v. A Psychiatrist**, the Court ordered release of the College's documents, subject to any claim of privilege by other complainants (or informants).

3. Sometimes the result depended on the position of the non-party holder of the privilege. See for example, **El-Bayoumi**, where the Dental Society took no position respecting privilege, and **A. v. L.**, where the College resisted direct production to the plaintiff but not by the defendant (subject to the files being admissible).

4. Sometimes courts upheld the privilege, or ordered disclosure, in ways not logically reconcilable. For example, in **Bergwitz v. Fast**, the Court held that the College's investigation report was not privileged, while in **Smith v. Royal Columbian Hospital**, the communications were held to be privileged.

In the latter case, **Bergwitz** was distinguished on the basis that the Credentials Committee investigation (**Smith** case) had a different purpose than the Discipline Committee investigation (**Bergwitz** case).

[86] In **Wright v. "The Sealness",** 2002 BCSC 473, the plaintiff sought from the Transportation Safety Board statements made by witnesses. The application was denied on the basis that the statements were not conventional statements (just notes by investigators not signed by witnesses) and the plaintiffs already had the Board's final report and RCMP investigation files which provided the names and functions of the witnesses referred to in the Board's report. The plaintiff's application sought to overcome a statutory privilege. In **F(PL) v. R(L)**, 2000 BCSC 245, the Court found notes, records and reports of the defendant's consultants and psychiatrists (prepared in relation to a criminal proceeding) to be privileged (per Wigmore), in part because the plaintiff was already in possession of all facts necessary to prove her case and did not require assistance of evidence that the documents might offer. In **Re S (F)**, 1997 CarswellAlta 918 (ProvCt), the Wigmore analysis was applied to a child welfare hearing. The Court compromised by ordering the release of raw test data but not notes on statements by children as the interests served by protecting such communications outweighed the interest in disclosure.

G.5 **ANALYSIS**

G.5.1 **First Wigmore Criterion** - The communications must originate in a confidence that they will not be disclosed.

[87] Kennedy's evidence is that the complainant, witnesses and respondent (nurse) were provided with copies of the College's Policy #4 and a letter entitled "Professional Conduct Process" ("Process letter") which explain how complaints are dealt with. The College relies on these two written documents to establish that all participants in the process believed that communications with respect to discipline investigations and hearings originated in a confidence that they would not be disclosed. Ms. Kennedy says that no participants asked questions about the letter or policy that she provided to them.

[88] The situation of the complainant, witnesses and respondent in respect of this process are not identical. Therefore I will review their positions separately.

[89] The complainant's identity was disclosed by the College in three ways. Her actual name was inadvertently disclosed when the College attached a copy of the first

page of the letter of complaint to one of the affidavits of Ms. Kennedy. Secondly, in the “Settlement Proposal”, a public document disclosed by the College at the conclusion of its discipline process, the complainant is clearly identified. Paragraphs A.5, A.6 and A.7 of the Agreed Statement of Facts disclose that Ms. Taylor’s unit manager was contacted by staff regarding possible misappropriation of narcotics; hospital management personnel met and discussed the matter and suspended Ms. Taylor; other nurses came forward and management held another meeting; and Ms. Taylor’s employer filed the complaint. Thirdly, Ms. Kennedy testified at the hearing that she had other dealings with the Unit Manager, from whom she obtained the names of the nurse witnesses she interviewed and from whom she obtained the relevant patient records.

[90] The complaint was filed before Ms. Kennedy became involved and had an opportunity to provide copies of the “Process letter” and Policy #4 to the complainant. There is no evidence that the Unit Manager (complainant) intended or expected that her complaint would be treated in a confidential manner and not disclosed. Of course, as a matter of common sense, managerial and administrative personnel in a organization or business know that the most effective and appropriate way to deal with human resource issues is in private; however, this is not, in my

view, the same as the "expectation of confidentiality" that is referenced in Wigmore's first criterion.

[91] I find that the complaint was filed and other materials were provided by the complainant without an expectation of confidentiality.

[92] With respect to the witnesses interviewed by Ms. Kennedy, whose statements are included in the Report, Policy #4 and the "Process letter" are not consistent with the College's position.

[93] Policy #4 says that all documents/information disclosed to complainants or respondents by the College - including the investigation of the complaint, remain College property and shall be held confidential by the respondent and complainant, and not disclosed by them or used in any proceeding with four exceptions, one of which reads, "unless otherwise required by law".

[94] The "Process letter" includes the following:

> (a) "Persons being interviewed should be aware that any information given by them to the investigator, that is relevant to the complaint, is potentially disclosable to the respondent."

> (b) "All information/documents obtained from the complainant, witnesses and respondent during this process remain the property of the CRNNS and is to be kept confidential by all parties and only disclosed in accordance with CRNNS Policy number four (attached)." and
>
> (c) "In the event there is any conflict between this overview and the RN Act, Regulations and Policies, the latter shall prevail."

[95] Item number (b) in the "Process letter" states that all information will be kept confidential per Policy #4 attached. Policy #4 refers only to disclosure by the complainant and respondent of information disclosed to them by the College. Policy #4 does not state or imply that witness statements (communications and documents) are given to the College in an atmosphere of confidentiality; on the contrary, The letter explicitly states that the communications may be disclosed to the respondent - the person whom the average witness would most likely be concerned (if at all) that disclosure be made to. The "Process letter" is clearly inconsistent with Policy #4 and, in accordance with item (c), it is the Policy that prevails.

[96] The written documents of the College confer no reasonable expectation of confidence that information/documents provided by witnesses will be kept confidential and not disclosed. Furthermore, as noted by counsel for the plaintiff, the Policy itself clearly provides for exceptions, one of which is that disclosure will be

made when required by law. The circumstances of this application are the circumstances that should have been contemplated by the wording of the exception.

[97] The College directed the Court's attention to the draft legislation that would amend the **Registered Nurses' Act** and make all discipline complaints and information confidential. Such would be a change in the law respecting the privilege attached to discipline proceedings of the College. Even so, Courts have sometimes been asked to override statutory privilege; in those cases, courts have applied the *Wigmore* criteria and in particular the fourth criterion. In those cases, the public interest in protecting the privilege has carried more weight than in circumstances where no statutory privilege exists.

[98] The Agreed Statement of Facts in the Settlement Proposal clearly states in paragraph A.5 that staff members approached Ms. Taylor's Unit Manager expressing concern about possible misappropriation of narcotics and, following her suspension on June 27, 2003, "a number of other staff nurses came forward to report their observations of Ms. Taylor". These facts contradict the College's representation as to both the expectation of confidentiality by the witnesses, and whether confidentiality is essential to the relations between the College and potential witnesses, at least in the

circumstance of this case. The Agreed Facts are consistent with the conclusion of Justice Mahar in **Finley**, quoted at paragraph 62.

[99] With respect to the respondent, the Court understands that she gave no statement to Ms. Kennedy; however, in response to Ms. Kennedy's Report, and the action of the Complaints Committee in suspending her nursing license, Ms. Taylor communicated with the College in late October, 2003. It appears that, at that time, she had the assistance of a Union representative; it is not clear whether she had legal representation. For the purposes of this analysis, I find that she would not have expected or intended that her response to the College would be disclosed, or used, for any collateral purpose.

G.5.2 **Second Wigmore criterion** - This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.

[100] With respect to this criteria, the position of the complainant, the witnesses, and the respondent are different.

[101] During the hearing, I asked counsel whether there was an ethical or legal duty upon the complainant (management personnel of the hospital) or the witnesses (nurses) to disclose inappropriate conduct that may affect nursing standards and patient safety. I find that there is a legal obligation on the complainant, and nurses to act with reasonable care towards patients, and this probably includes taking reasonable steps to protect present and future patients from malfeasance from other professionals (including nurses). If I am mistaken with regards to the legal duty of nurses, it is clear that, as professionals, they have an ethical duty. This duty is referenced in the "Code of Ethics for Registered Nurses" and "Standards for Nursing Practice" (Tab A, Colleen Taylor's affidavit); in the Code, particular reference is to page 9 - paragraph 8 and 9 of "Safe, Competent & Ethical Care", page 10 - paragraphs 5 and 9 of "Dignity", and especially paragraph 10 of "Accountability" and Appendix A; in the Standards, particular reference is to the accountability standard (1.3 and 1.4), and self-regulation standard (6.4- report misconduct, etc.)

[102] The College submits that the nurse witnesses would not have come forward (at least "a few", according to Ms. Kennedy) if they had realized or expected that their communications would be disclosed. This, as noted above, is contradicted by the Agreed Statement of Facts. While it is not central to this decision, the Court would

have expected that if there was any concern by witnesses as to disclosure of their evidence, it would have been concern about disclosure to the respondent herself with whom they obliged to work; Policy #4 and "Process letter" put them on notice that relevant information could be disclosed to the respondent.

[103] I find that the element of confidentiality was not essential to the full and satisfactory maintenance of the relationship between the complainant and the College, or between the witnesses and the College. It would be cynical to believe that professionals would not carry out their responsibilities if they knew that, at some point, their information may be used in the judicial forum.

[104] The position of the respondent with regards to the College is different from that of the complainant or the witnesses.

[105] The College makes the point, supported by the evidence of Ms. Kennedy, that all cases of discipline have been resolved through settlement and none have gone to hearings. Ms. Kennedy attributes this to the fact that respondents feel free to be frank about the complaint, which frankness is the first step to settlement. The College says that their ability to process discipline complaints through the settlement process

would be compromised by reason of the non co-operation of respondents, if the disclosure by respondents of their wrong doing is not kept confidential.

[106] There are three reasons why Ms. Taylor might co-operate with the College:

(a) there was the risk that the College would conduct a hearing and make findings and sanctions that could be much more serious than if she co-operated;

(b) she may obtain concessions from the College with respect to the complaints against her; and

(c) she had a genuine wish to resolve the matter, and act ethically (the Code, page 9, paragraph 8 requires nurses to admit mistakes).

[107] The Court accepts that it is possible that if respondents were conscious of the collateral disclosure of discipline proceedings, more formal hearings may occur and fewer settlements may be reached. I am not satisfied that such would necessarily have an adverse effect on the College, whose primary purpose is to maintain safe nursing practices and protect the public. It may increase the cost of some proceedings, but such may also serve as a means to promote the message of safe nursing practices, and, collaterally, that the College is fulfilling its public protection role through self-regulation. The court is not satisfied that the motivation for a respondent to settle, and avoid a formal hearing (which, in some self-regulating professional organizations, are

public events), is the offer of confidentiality, as much as the avoidance of harsher consequences, and greater publicity resulting from formal hearings.

[108] I note that, in **A. v. L**, the legislation governing the College of Chiropractors contained a statutory privilege, preventing a chiropractor's own testimony from being used against him in subsequent civil proceedings. In paragraph 22, the Court noted that such a statutory privilege is consistent with the intention to give a full right of self defence without fear of self incrimination. The Court goes on to say:

> Absent express legislative provision, it should not be expanded to other types of evidence, in the interests of promoting full and fair disclosure and thus a proper trial of the civil matter.

In the case at bar, no statutory privilege yet exists.

[109] Finally the Court notes that the role of the College is not the same as that of the nurses' union. While the College has some role to play in assisting nurses, its primary objective and responsibility is the protection of the public, and that objective is fulfilled by ensuring appropriate practice standards.

G.5.3 **Third Wigmore Criterion** - The relation must be one which in the opinion of the community ought to be sedulously fostered.

[110] The applicant acknowledges that in the community the relationship between complainants, witnesses and respondents ought to be sedulously fostered. Counsel for the applicant submitted that confidentiality, or more specifically, non-disclosure in a court proceeding, was not an expectation of the participants, nor essential for the ability of the college to carry out its public function. I agree.

G.5.4 **Fourth Wigmore Criterion** - The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[111] Because I have concluded that the complainant and witnesses did not communicate with the College with an expectation that their communication would not be discloseable in the context such as a civil action, and that confidentiality (that is, non-disclosure in a civil action as opposed to non-disclosure to the respondent nurse) was not an essential requirement for the effective functioning of the College's discipline process, there is no requirement to balance the competing public interest with respect to disclosure of the College's Report. If I am wrong in these conclusions, what results from a balancing of the competing interests?

[112] To the extent that the respondent nurse had an expectation of confidentiality, and if I am wrong in concluding that her expectation of confidentiality was not essential to the full and satisfactory maintenance of the relation between the parties, what results from a balancing of the competing interests?

[113] On one side is the admonition of Lord Denning in **Riddick v. Thames Bd. Mills Ltd** [1977] 3 All E.R. 677, cited by Matthews, J.A., in **Upham v. You**:

> The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest in discovering the truth, ie in making full disclosure. . . .

[114] In the case at bar the plaintiff's physical and mental condition at the time of the cause of action was such that she depends upon the evidence of the professionals present at the time of her care in the defendant hospital. Statements taken by witnesses with regards to the conduct of the defendant nurse proximate in time to the allegations which constitute the cause of action are the only contemporary statements. An opportunity for discovery more than three years later can not substitute for those contemporary records.

[115] I have concluded that the implied undertaking rule does not likely apply, and the non-disclosure of the Report would give the defendant an unfair and unjustifiable advantage at trial.

[116] I have already concluded that the complaint and witnesses fulfilling a legal and/or ethical duty when they reported the defendant nurse, and that confidentiality was not a central feature of their disclosure or of the ability of the College to perform its discipline function and thereby protect the public interest. To the extent that I am wrong, the specific acts of this case and the inability of the plaintiff to have an opportunity to establish her allegations, other than with the assistance of the Report prepared by the College shortly after the alleged events, would be a very significant hindrance to the public interest in discovery the truth.

[117] The Court is not satisfied, on a balance of probabilities, that the defendant nurse responded to the investigation, and complaint against her, only because, or even primarily because, she expected her response to be kept confidential, or, if she knew it would not be kept confidential, that she would not have responded to the allegations and complaint.

[118] On the other side is the representation that the College's discipline process, and thereby its ability to protect the public interest, would be seriously impinged by disclosure of the Report and the defendant nurse's response.

[119] While acknowledging that a requirement to disclose documents and communications might result in some formal discipline hearings, and therefore some cost to the College, I am satisfied that the credibility of the College, as a self regulating body, might be enhanced, and would not be damaged, by the holding of discipline hearings on some occasions.

[120] The detail contained in the Settlement Proposal released by the College at the end of the discipline process contained significant and substantial disclosure of the complaints against the defendant nurse, and of the manner in which the College responded. To the extent that the Court is concerned with the defendant's privacy interest, the release of the Settlement Proposal diminished significantly that as a relevant factor. This conclusion does <u>not</u> take into account the argument that the applicant first made during rebuttal to the respondents' closing arguments - that the release by the College of the Settlement Proposal and the acknowledgment that all

nurses interviewed were identified by the defendant's Unit Manager, constituted a waiver or partial waiver of privilege for many of the documents. I found it unfair to make this argument at that late stage, without an adjournment and opportunity for the respondents to reply; as a result, the applicant withdrew the argument, and resurrected it in a post-hearing letter. I make no determination of the issue of waiver or partial waiver.

[121] If and when the legislature of the Province of Nova Scotia approves the proposed amendment to the **Registered Nurse's Act**, which includes a statutory privilege with respect to discipline proceedings for the College, the answer to an application like this may differ.

H. CONCLUSION

[122] I order disclosure and production to the plaintiff of the Report and the response of the defendant to the College with respect to the Report. Disclosure is limited to relevant communications and documents which I determine to be those between the first day of March 2003 and the last day of June, 2003. The order will include a

provision that permits the respondents to defer delivery for thirty days after the date of issuance of the order.

[123] The Court will hear the parties with respect to costs if necessary.

J.